XII-189 (Jail) C J.P.R-/9-94

जा.अ. 1154/98

CF0000060217

(2)

APPEAL OF PRISONER

Division Bench (Criminal)

No दण्डितबंदी क्र॰ 891/57 Name निर्मल तिर्की

Father's name सोनसाय तिर्की, मुकाम-पाकरगांव, थाना-पत्थलगांव, जिला-रायगढ़ (म.प्र.)

Residence धारा-302 भा॰दं॰वि॰ Age 35 वर्ष

Sentenced to सजा-आजीवनकारावास on 18-03-1998

Under Section _____ by द्वितीय अपर सत्र-न्यायाधीश रायगढ़

It is explained to the prisoner that if he states he wishes to be represented by a legal practitioner the appellate Court will not proceed with the case for seven days unless the legal practitioner appears earlier. If the legal practitioner does not appear within seven he may not heard at all if the Prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to my legal practitioner who should appear.

1 Date of Application for copy of Judgement _____

2 Date on which copy received _____

3 Date on which Appeal sent 02-05-1998

4 Whether the prisoner wishes to be represented or not. हाँ

No दण्डितबंदी क्र॰ 891/57 Name निर्मल तिर्की पि॰ सोनसाय तिर्की

Confined in Jail सर्किल बिलासपुर (मध्यप्रदेश)

No. _____ Dated 02.05.1998 1998

Forwarded to the रजिस्ट्रार महोदय, माननीय उच्च न्यायालय-जबलपुर (म.प्र.)

to gether with a copy of judgement or order passed in the case for favour of transmission to the proper Appellate court.

जिला Superintendent

जिला जेल बिलासपुर

Date of receipt in _____ Office _____

Date of receipt of record to accompany the _____

Memo of Appeal to the Appellate court _____

No _____ Dated _____ 199 _____

Forwarded to the

_____

Date of receipt in Appellate court _____

(11)

DIVISION BENCH : HON'BLE SHRI DHIRENDRA MISHRA, J &
HON'BLE SHRI DILIP RAOSAHEB DESHMUKH, J.

Criminal Appeal No. 1154 of 1998

Appellant — Nirmal Tirkey

Vs

Respondent — State of M.P.

Smt. Indira Tripathi, learned counsel for the appellant.

Shri Sudhir Bajpai, learned P.L. for the State.

ORAL JUDGMENT
(06/07/2006)

Per Dhirendra Mishra, J

The appellant has preferred this Criminal Appeal under Section 374(2) of the Cr.P.C. against the judgment of conviction and order of sentence dated 18th of March 1998 passed by learned Second Additional Sessions Judge, Raigarh in S.T. No. 116/1997 whereby the learned Second Additional Sessions Judge after holding the accused/appellant guilty for commission of the offence under Section 302 of the IPC sentenced him to undergo imprisonment for life for causing homicidal death of his own father namely Son Sai.

2. Briefly stated the prosecution case is that earlier accused/appellant was married. However, his wife after leaving her, again got married. As his second wife also deserted him and lived with her parents the accused/appellant used to insist his father (since deceased) that he should be married but the deceased did not care as a result of which on 05.05.97 in the evening at about 5.00 p.m. when the deceased was cutting *Kathal (Jack fruit)*, accused/appellant came there and assaulted the deceased twice with a wooden plank. On hearing the noise, Gopal Uraon, brother and Monica, sister of the accused/appellant came out of the house and saw the incident. However the appellant also chased them. Report of the incident was lodged by Gopal Uraon, P.W.-2 on the basis of which merg intimation of Ex.P-3 and First Information Report of Ex.P-4 under

IPC was registered. After performing inquest report of Ex.P-7 body of the deceased was sent for autopsy to Primary Health Centre, Pathalgaon where Dr. Purushottam Suthaar, P.W.-1 conducted the post mortem and submitted his report of Ex.P-11. On the basis of memorandum of the accused/appellant, a wooden plank by which the deceased was assaulted has been seized from his custody vide seizure memo of Ex.P-9. Blood stained soil and plain soil was seized from the place of occurence vide Ex.P-10. A sealed packet containing vest and dhoti of deceased Son Sai was taken into possession vide Ex.P-12. The seized article - wooden plank and blood stained and plain soil were sent for chemical examination to Forensic Science Laboratory, Raipur vide Ex.P-13. After completing the investigation charge sheet was filed in the Court of Judicial Magistrate First Class, Dharamjaigarh who in turn committed the case to the Court of Sessions Judge and the same was received on transfer for trial by the learned Additional Sessions Judge.

3. Charge under Section 302 of the IPC was framed against the appellant. The appellant abjured his guilt.

4. Prosecution in order to establish its case examined eight witnesses in all and thereafter statement of the accused/appellant under Section 313 of the Cr.P.C. was recorded. The accused denied the circumstances appearing against him in the prosecution case and pleaded innocence. However, learned Additional Sessions Judge convicted the appellant and sentenced him as above.

5. Homicidal death of deceased Son Sai is not in dispute. Even otherwise considering the statement of (P.W.-1) Dr. Purushottam Suthaar who conducted the post mortem proved the report of Ex.P-1 & has found lacerated wound on the left side of the occipital bone and on internal examination has found fracture of the bone of Occipito parietal region and the membrane of brain was ruptured and blood clottings were found and has further opined that the cause of death is injury over vital organ – brain and the death was due to shock and coma and the same was homicidal in nature, the homicidal death of deceased is established.

6. The conviction of the appellant is based on the statements of P.W.-2 Gopal Tirkey (Complainant), P.W.-5 Monica Tirkey and P.W.-6 Hurda. P.W.-2 Gopal Tirkey and P.W.-5 Monica Tirkey are eye witnesses of the incident. Learned counsel for the appellant submits that from perusal of the statement of P.W.-2 Gopal Tirkey it would be evident that he was in fact not the eye witness of the incident as he has made material improvements over his diary statement. Similarly the eye witness account given by P.W.-5 Monica Tirkey can also not be relied upon because this witness has claimed herself to be the eye witness of the incident though in her diary statement of Ex.D-1 she has stated that she has not witnessed the incident. Further this witness has attributed two assaults over the deceased and no corresponding injuries were found by the doctor performing autopsy.

7. Learned counsel for the appellant further submits that even if it is held that the appellant was responsible for the offence in question, the offence does not travel beyond Section 304-II of the IPC as the same was done without any premeditation, in the spur of moment and only a single injury over the head has been found.

8. On the other hand, learned counsel for the State supports the judgment of the trial Court.

9. We have heard learned counsel for the parties. P.W.-2 Gopal Tirkey is undisputedly the real brother of accused/appellant and son of the brother of deceased and he has lodged the report on the same day i.e. on 05.05.97 naming the present appellant as the perpetrator of the offence. He has described the circumstances in which the offence was committed in the First Information Report. In the Court statement also he has stated that his uncle Son Sai was sitting under the *Kathal tree (Jack fruit tree)* and was cutting *Kathal*, at that time accused/appellant Nirmal Tirkey came with a wooden plank and assaulted Son Sai on his head and he was standing at a little distance from the place of incident. After assaulting he fled away. Blood started oozing from the injury on his head and he fell

down. At first Monica came and thereafter the villagers came. Hurda, brother of accused/appellant and son of deceased Son Sai and others came on the spot. After the incident, he lodged report of Ex.P-3 and Ex. P.-4 in the police station.

10. The defence in the cross examination of this witness has not been able to elicit any circumstance which impeaches his credibility or in any manner makes his evidence untrustworthy or unreliable. The statement of this witness is to be appreciated in the light of the fact that he is the real brother of the accused/appellant and as such he has no axe to grind against the accused/appellant. The testimony of this witness is further corroborated by the statement of P.W.-5 Monica Tirkey who is none else than the sister of accused/appellant and who has also stated that at the time of the incident she was in her home and she had seen the incident and by the time she could reach there the accused/appellant had already given second assault and she has also stated that he tried to chase her. She has further stated that after the incident, the accused/appellant had thrown the wooden plank in the kitchen garden and ran away. In the cross examination, the defence has tried to impeach the credibility of this witness by confronting her with her diary statement of Ex.D.-1. From the perusal of her diary statement and the account given by her in her examination in chief, we do not find any material discrepancy and therefore simply because she has made some improvement regarding witnessing the assault, the whole testimony of this witness cannot be discarded. The account of these witnesses are further corroborated by P.W.-6 Hurda who has stated that immediately after the incident he came there hearing the shouts of his sister who told him that Nirmal has assaulted her father and thereafter he found his father lying dead.

11. Thus, from the statement of the above witnesses which is duly corroborated by the First Information Report, the merg intimation as well as the post mortem report of Ex.P-1, we are of the considered opinion that the Court below was justified in holding the accused/appellant's involvement in the crime in question.

12. The second question for consideration of this appeal is whether the Court below was justified in holding the accused/appellant guilty of offence under Section 302 of the IPC or whether the offence false within Section 304-II of the IPC?

13. It is not in dispute that there was no motive to the accused for causing the death of his father. As per allegations, the appellant was desirous of marriage and his father was neglecting his demand as a result of which out of sudden quarrel with his father, he dealt a single blow with a wooden plank over his head. Therefore we are of the considered opinion that the offence in question was not committed by the appellant with any premeditation or with an intention to cause death of his father though knowledge that the assault might cause his father's death can be attributed to the appellant. In the aforesaid circumstances, the conviction of the appellant under Section 302 of the IPC cannot be sustained and the offence committed by the appellant does not travel beyond Section 304-II of the IPC.

14. The conviction and sentence awarded to the accused/appellant under section 302 of the IPC by the trial Court are set aside and instead the appellant is convicted under section 304-II of the IPC. Learned counsel for the accused/appellant submits that the appellant is in jail since 06.05.97 and as such he has already completed more than nine years' jail sentence which is not disputed by learned counsel for the State. In the aforesaid circumstance ends of justice will be served if the appellant is sentenced for the period already undergone by him. The accused/appellant be set at liberty forthwith if not required in any other case.

15. Appeal partly allowed.

Sd/-
DHIRENDRA MISHRA
Judge

Sd/-
Dilip Raosaheb
Deshmukh
Judge